No. 02-626

# In The Supreme Court of the United States

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,

*Petitioner,*

v.

MICCOSUKEE TRIBE OF INDIANS, *et al.*,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## REPLY BRIEF


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## REPLY BRIEF

The court of appeals has vastly expanded the reach of the NPDES program by requiring the petitioner and by extension thousands of water managers nationwide, to enroll its water diversion facilities in the NPDES permit program. Fifteen amici have joined in five briefs urging this Court to grant certiorari. These briefs, filed by organizations representing hundreds of interests across the nation as diverse as states, municipalities, agriculture, sewerage agencies, water suppliers, flood and stormwater managers, drainage districts, private landowners and private foundations attest to the critical importance of the issues presented in the Petition.

Contrary to respondents' assertion – and as the extraordinary range of amici submissions demonstrate – the petitioner has not exaggerated the reach of the court of appeals' decision in this case or the depth of inter-circuit conflict that has developed.

As the amici point out, everyone having to manage water from governmental agencies to private landowners use dams, ditches, canals, levees, pumps and other diversion facilities to separate and divert water. The court of appeals has transformed these traditional water management activities into "discharges of pollutants" which are subject to an intricate and extremely burdensome scheme of federal regulation and criminal penalties. Local water managers and farmers, operating with scarce resources, are in no position to absorb the significant costs thrust upon them by the lower courts. No wonder the numerous amici maintain that the decision in this case threatens their ability to provide the public and themselves with vital flood protection and sufficient water supply. The

petitioner is particularly concerned with maintaining the operational flexibility needed to deal with Florida's ever changing hydrological conditions brought by hurricanes, seasonal cycles and droughts. Respondents do not deny the importance of this case or the questions presented.

### 1. The Inter-Circuit Conflict Is Clear And Cannot Be Reconciled.

Respondents mischaracterize *National Wildlife Federation v. Gorsuch, Admin., U.S. Environmental Protection Agency*, 693 F.2d 156 (D.C. Cir. 1982) and *National Wildlife Federation v. Consumers Power Company*, 862 F.2d 580 (6th Cir. 1988) in their attempt to mask the inter-circuit conflict pointed out in the Petition. For example, the respondents incorporate the 2nd Circuit's contention that *Catskill* is in "harmony" with *Gorsuch* and *Consumers Power* "provided the 'outside world' includes other navigable waters." Opp. at 10, quoting *Catskill Mountains Chapter of Trout Unltd., Inc. v. City of New York*, 273 F.3d 481, 491 (2nd Cir. 2001).[1] The fact remains that *Gorsuch* and *Consumers Power* do not consider the "outside world" to include other navigable water bodies. See *Gorsuch,* at 175; *Consumers Power* at 585. In both cases, EPA argued that "an addition from a point source occurs only if the point source itself physically introduces a pollutant into

[1] The 11th Circuit similarly extended the phrase "outside world" to include "other navigable water bodies," but without any pretense of harmony between the circuits. Pet. 6a n.5. The 11th Circuit's opinion that another navigable water body, to which nothing is added, can be a source of pollutants as compared with the 6th and D.C. Circuit's "addition" test illustrates the very conflict this Court is being asked to resolve.

the water from the outside world." *Gorsuch* at 175. The D.C. and 6th Circuits agreed that passing polluted water from one navigable water body (the reservoir or impoundment areas) into another (the river or lake) was not an "addition" of pollutants into the navigable waters from the point source through which they pass. *Id*. Thus, the D.C. and 6th Circuits did not consider the transfer of pre-existing pollutants that are added from another water body to trigger NPDES because they were not from the "outside world." The 1st, 2nd and 11th Circuits, on the other hand, consider the mere transfer of pre-existing pollutants between water bodies to require NPDES permitting. Therein lies the clear conflict.

This inter-circuit conflict also is manifest in the Eleventh Circuit's declaration that the "relevant body of water is the receiving body of water." Pet. 6a. In both *Consumers Power* and *Gorsuch,* pollutants were transferred into the "receiving" water body, yet no permit was required. The D.C. and 6th Circuits explained that if Congress intended NPDES to apply to "all pollutants released through a point source" it could have easily chosen suitable language, but instead it chose to limit NPDES to the "addition" of pollutants "from" a "point source." *Gorsuch*, at 176; *Consumers Power*, at 586. By changing focus to the "receiving water body," as opposed to the navigable waters as a whole, the 1st, 2nd and 11th Circuits have greatly expanded the NPDES program to include hundreds of thousands of water management activities. Thus, the 11th Circuit's "but for" test squarely conflicts with the D.C. and 6th Circuit's adherence to EPA's traditional "addition" test.

Respondents also mistakenly claim that this case is factually similar to *Dubois* and *Catskill*, because they

involve the movement of water between "separate and distinct" water bodies and, in turn, that it is distinct from *Gorsuch* and *Consumers Power* because they involve the movement of waters within the "same" water body. Opp. 12-13. As discussed below, neither characterization is accurate or relevant.

Contrary to respondents' contention that this case involves "separate and distinct" water bodies, the 11th Circuit noted that the waters of the C-11 Basin and the WCA-3A naturally "intermingled" and are essentially a "single body of navigable water." Pet. at 8a n.8. Understanding that the waters involved in this case are all part of the same natural water body, separated only by the very water control system that is being challenged, this matter cannot be fairly distinguished from *Gorsuch* or *Consumers Power* as attempted by the respondents. The waters managed by S-9 are in fact no more or less "separate" or "distinct" then the reservoir was from the river in *Gorsuch* or the impoundments were from the lake in *Consumers Power*. The L-31 and L-37 levees operate as a dam to create the WCA-3A impoundment area. See Pet. 3a.[2]

[2] Also unpersuasive is the respondents and the 11th Circuit's attempt to limit the *Gorsuch* addition test to hydropower dams. Opp. at 5 & 11, Pet. 6a n.4. As *Consumers Power* noted when applying the traditional addition test to vast impoundment areas carved out of a lake side by a series of levees, the test adopted by *Gorsuch* is neither expressly nor logically limited to dams. *Consumers Power*, at 583. Moreover, dams are defined under federal law as any structure that impounds water. *Consumers Power,* at 590. The levees in both *Consumers Power* and this matter perform that very basic water management function.

Equally unpersuasive is the respondents' attempt to align this case with *Dubois* and *Catskill*. The 1st and 2nd Circuits distinguished *Gorsuch* and *Consumers Power* by noting that the water bodies in *Dubois* and *Catskill* would, but for the point source, never naturally[3] intermingle. That distinction cannot be made in this case, which like *Gorsuch* and *Consumers Power*, presents the opposite situation where water control structures prevent the water from intermingling as one water body.

Moreover, the respondents' reliance upon these factual distinctions is misplaced. All five cases, *Dubois, Catskill, Gorsuch, Consumers Power*, and this matter, involve the transfer of water from one water body to another, whether naturally or artificially separated. The broad tests enunciated in these cases, whether the traditional "addition" test or the expansive "but for" test, are neither expressly nor logically limited by the historic relationship between the waters. Certainly, the 6th and D.C. Circuits treated the reservoir, river, lake and impoundment area as separate water bodies in the same way the 11th Circuit treated the C-11 basin and the WCA-3A impoundment area.

Thus, under the Eleventh Circuit's "but for" test, it is irrelevant whether the waters being diverted were

[3] Without explaining its relevance, the Eleventh Circuit, District Court and respondents note that the S-9 "changes the natural flow of a body of water." See Pet. 7a, Opp. 2. All point sources, however, by their very nature divert water away from their "natural flow." Recognizing pollution often results from such activities, Congress specifically directed EPA to develop non-point source guidelines to address such changes to the flow and movement of water. 33 U.S.C. §1314(f)(2)(F). Amazingly, respondents made not even a reference to that statutory directive.

naturally one or not. The "but for" test applies to the diversion of water from one water body into another, regardless whether they were originally part of the same water body. The "addition" test, on the other hand, excludes water diversions from the NPDES program unless something is added by the point source. These tests, which have distinctly collided in this case, cannot be reconciled as respondents have argued and have incredibly broad ramifications as pointed out by the amici representing thousands of concerned citizens nationwide.

**2. Deference Is Proper In This Case.**

As also noted by the amici in this case, EPA and its cooperating state partners do not require NPDES permits for the millions of water control structures nationwide that, like the S-9 facility, merely divert water without introducing pollutants. See e.g. NCY Brief at 2. Respondents do not contend that EPA and DEP believes that the S-9 has been operating illegally. Nor is there any disagreement that EPA and DEP exercise strict regulatory oversight over the petitioner. The state and federal governments have jointly striven to address the water quality changes created by S-9 and the petitioner's numerous other structures throughout south Florida under alternative state programs. Respondents miss the point, by a mile, that it is the agencies' longstanding and consistent practices and policies, described more fully in the Petition, that are entitled to at least some judicial deference.

Respondents instead focus myopically upon only the formal written positions expressed in *Gorsuch* and *Consumers Power* and the position letter issued by DEP's general counsel. In doing so, they concede the applicability

of *Mead* and *Skidmore* (Opp. at 24), yet fail to give appropriate weight to those and many other circumstances that render the agencies' position persuasive. For example, the respondents completely ignore the historic development of the alternative state permitting regime under which the S-9 operates.

Respondents also mischaracterize the positions taken by EPA in *Gorsuch* and *Consumers Power* and by DEP's general counsel as mere litigating positions. Neither DEP nor EPA has been party to this or any other CWA litigation involving the petitioner's structures. These position statements, rather, reflect and explain the regulatory agencies' position and policies toward the application of NPDES to water management facilities, not their defensive litigating posture. The *Gorsuch* and *Consumers Power* opinions present a detailed analysis of the agencies' position and the intent of Congress to divide responsibility for water pollution between the states, develop a strong cooperative federalism scheme and to leave the regulation of traditional water management to areawide, watershed planning programs rather than the NPDES program.

Under the totality of these circumstances, the 11th Circuit's cursory and complete denial of any deference to the administrative agencies that have been implementing CWA policy for over thirty years was improper.

### 3. Respondents Fail To Recognize That The NPDES Was Intended To Regulate Those Sources From Where Pollutants Originate.

Respondents' misconception that it does not matter from where the pollutants originate is reflected in their completely misguided contention that *United States v.*

*Law*, 979 F.2d 977 (4th Cir. 1992), "stressed the origin of pollutants in CWA cases is irrelevant." Opp. 18. That case stands for the completely opposite proposition. In *Law*, the appellant also argued under *Gorsuch* and *Consumers Power* that it was not responsible for merely diverting the flow of pre-pollutants. *Law* at 979. The 4th Circuit acknowledged the inaccuracy of a jury instruction that denied the defense that all of the pollutants being transferred "originated" from somewhere other than the defendant's property. *Id*. This error was harmless, however, because the pollutants were being transferred into the navigable waters from "a treatment system that was, as a matter of law, not part of the navigable waters." *Id.* at 980. Thus, the key to liability under *Law* was that, unlike this case, some pollutants were added by the point source from outside the navigable waters. *Id*. at 980. Properly understood, *Law* strongly supports the petitioner's contention that the pollutants must indeed originate from the point source before the NPDES program is triggered.

Respondents also misrepresent that there are "scores of cases where the point source itself did not add pollutants to any of the waters it conveyed. . . . " Opp. 17. The few cases cited for this proposition are inapposite. For example, *Dague v. City of Burlington*, 935 F.2d 1343 (2d Cir. 1990) required the city to attain an NPDES permit for pollutants originating from its landfill. Both *United States v. Ottati & Gross, Inc.*, 630 F. Supp. 1361 (D.N.H. 1985) and *United States v. Velsicol Chem. Corp.,* 438 F. Supp. 945 (W.D. Tenn. 1976) involve criminal actions against those from which pollutants originated. Each of those cases are inapposite because they hold those sources from which pollutants originate responsible under NPDES. In this case, to the contrary, the petitioner has been improperly

held responsible for all of the pollutants that originate from other sources. These cases simply do not support the 11th Circuit's expansion of the NPDES program to water managers that have not introduced any pollutants into the waters.

**4. Respondents Fail To Address The Propriety Of The Non-Point Source Programs To Regulate The Petitioner's Water Management Operations.**

Finally, Respondents fail to say anything at all about the damage done by the 11th Circuit's decision to the CWA's careful apportionment of regulatory responsibilities between the federal and state governments. In fact, they do not so much as mention §§ 208 (33 U.S.C. § 1288), 303(e)&(d) (33 U.S.C. §§ 1313(e)&(d)) and 319 (33 U.S.C. § 1329) of the CWA, which assign to the states regulatory authority over non-point sources of pollution and § 304(f)(2)(F) (33 U.S.C. § 1314(f)(2)(F), which clearly contemplates pollution caused by flow diversions to be addressed through non-point source programs. The CWA amendments were expressly intended to encourage "the State[s] to assume more and more of the responsibilities of the water pollution program." S. Rep. No. 95-370, 1977 U.S.C.C.A.N. at 4357. The amici make clear, however, that the 11th Circuit has thrown a wrench into traditional water management and has widely encroached upon what was up until this case a respected state preserve.

By redefining the term "addition" to encompass routine water transfers, the court of appeals has all but gutted the alternative, state based regulatory scheme designed to address pollution caused by the diversion of water set forth in §§ 208, 303(d)&(e), 304(f)(2)(F), and 319 of the CWA. As emphasized by the amici, water managers

never before expected to enroll in the NPDES program will now have to seek federal permits for what are routine transfers of water between various watersheds and basins throughout the nation regulated for the first thirty years of the CWA under its state programs.

For these reasons as well as those contained in the five amici briefs filed in this case, Petitioner requests this Court to grant the requested writ of certiorari.

Respectfully submitted,

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